KERAJAAN MALAYSIA

v.

WONG POT HENG & ANOR.

FEDERAL COURT, KUALA LUMPUR
CHONG SIEW FAI CJ (SABAH & SARAWAK)
PEH SWEE CHIN FCJ
MOHAMED DZAIDDIN FCJ
[CIVIL APPEAL NO. 01-15-1992]
6 MAY 1996

CONSTITUTIONAL LAW: *Legislation - Retrospective legislation - Subsidiary legislation - Delegated authority - Power to legislate with retrospective effect - Restrictions - Whether required express power in parent Act - Emergency (Essential Powers) Act 1979 s. 2 - Essential (Protection of Depositors) Regulations 1986, regs. 9(1)(c), 13 - Essential (Protection of Depositors) (Amendment) Regulations 1991, regs. 9B, 13(2)*

CONSTITUTIONAL LAW: *Legislation - Retrospective legislation - Validity - Whether exclusive domain of the legislature - Power of delegated authority - Mere power to make regulations - Whether could legislate retrospectively - Absence of express power in parent Act to so legislate - Whether fatal - Presumption against retrospective operation of statutes - Emergency (Essential Powers) Act 1979 s. 2 - Essential (Protection of Depositors) Regulations 1986 regs. 9(1)(c), 13 - Essential (Protection of Depositors) (Amendment) Regulations 1991 regs. 9B, 13(2)*

The first and the second respondents ('the plaintiffs'), the employees of the Co-operative Central Bank Ltd ('CCB'), had each obtained an award from the Industrial Court for wrongful dismissal, and were awarded damages of RM424,428.81 and RM 425,412.50 respectively. As a result of CCB's collapse and a rescue operation for its depositors, the Central Bank of Malaysia, under regulation 9(1)(c) of the Essential (Protection of Depositors) Regulations 1986 ('the Regulations of 1986'), applied to the High Court and obtained an order for the appointment of receivers to manage the affairs of CCB. The Central Bank thereafter injected some RM523 million into CCB, and following that, to ensure that the depositors be accorded the priority of payment, the Yang di Pertuan Agong, exercising the powers given him by the Emergency (Essential Powers) Act 1979 ('the parent Act'), and by amendment to the Regulations of 1986, enacted regulations known as Essential (Protection of Depositors) (Amendment) Regulations 1991 ('the Regulations of 1991'). The Regulations of 1991 in effect introduced new regulations into the Regulations of 1986, *viz.* regs. 9B and 13(2). This apart, through the deeming provisions of regs. 9B(2)

and 5(2) therein, the Regulations of 1991 also sought to give retrospective force to the regs. 9B and 13(2), so that both were deemed to have come into effect on 23 July 1986.

The plaintiffs, being aggrieved by the Regulations of 1991, applied for a ruling on the validity of the Regulations. The High Court held that regulations 9B and 13(2) were invalid in so far as they purported to operate retrospectively, because the delegated authority under the parent Act for making the regulations, i.e. the Yang di Pertuan Agong, had no power to make them with retrospective effect under the relevant part of the parent Act *viz.* its s. 2. The Government of Malaysia, the defendant below, appealed against this ruling arguing, *inter alia*, that s. 20 of the Interpretation Act (Act 388) provided ample support for the validity of the regulations in question. Before the Federal Court the primary issue that arose was whether, in the absence of express power given by the parent Act, it is open for a delegated authority to make subsidiary legislation, and give retrospective effect thereto.

Held:
Per Peh Swee Chin FCJ:

[1] Any subsidiary legislation can only be made with retrospective operation if it is authorised by an express power in, or by necessary implication from its parent Act. Hence, in order to be *intra vires*, reg. 9B and reg. 13(2) must comply with s. 2 of the parent Act, i.e. they must come within the scope of the section.

[2] Section 2 of the parent Act has not expressly conferred power on the delegated authority to legislate retrospectively. The Yang di Pertuan Agong, in the premises, had no power to make the regulations in question.

[3] Section 2 of the parent Act, by subsection 2(j) thereof, has given the delegated authority, i.e. the Yang di Pertuan Agong, the power of "amending any written law", for "suspending the operation of any written law" or for "applying any written law with or without modification". Upon its proper reading, s. 2, by necessary implication, may have conferred power to the delegated authority to legislate retrospectively. However, whilst it is true that, by making the operation of regs. 9B and 13(2) of the Regulations of 1991 retrospective to 23 July 1986, it may seem very much to be an act of "amending any written law" by the delegated authority, on the facts and the circumstances herein, the implication of such power is not a "necessary" or essential one.

[4] Section 20 of our Interpretation Act refers to various such subsidiary legislation which "may be made". Although the words "may be made" give rise to some ambiguity, s. 20, with the limitation therein contained, merely permits the making of retrospective subsidiary legislation if the source of such power for making it comes from a valid or competent source such as statute of the legislature. If no such power is given, the delegated authority is not entitled to legislate retrospectively.

[Appeal dismissed.]

*[**Bahasa Malaysia** Translation of Headnotes]*

UNDANG-UNDANG PERLEMBAGAAN: *Perundangan kebelakangan - Perundangan subsidiari - Pihak Berkuasa perwakilan - Kuasa untuk menggubal dengan kesan kebelakangan - Sekatan - Samada memerlukan kuasa-kuasa nyata dalam Akta induk - Akta Darurat (Kuasa-kuasa Khas) 1979 s. 2 - Peraturan Perlu (Perlindungan Penyimpan) (Pindaan) 1986 per. 9(1)(c), 13 - Peraturan Perlu (Perlindungan Penyimpan)(Pindaan) 1991 per. 9B, 13(2)*

UNDANG-UNDANG PERLEMBAGAAN: *Perundangan kebelakangan - Keesahan - Samada domain eksklusif perundangan - Kuasa pihak berkuasa perwakilan - Kuasa semata-mata untuk membuat peraturan-peraturan - Samada boleh menggubal secara kebelakangan - Ketiadaan kuasa-kuasa nyata dalam Akta induk bagi menggubal sedemikian - Samada memudaratkan - Andaian bahawa statut tidak beroperasi secara kebelakangan - Akta Darurat (Kuasa-kuasa Perlu) 1979 s. 2 - Peraturan Perlu (Perlindungan Penyimpan) 1986 per. 9(1)(c), 13 - Peraturan Perlu (Perlindungan Penyimpan) (Pindaan) 1991 per. 9B, 13(2)*

Responden-responden pertama dan kedua ('plaintif-plaintif'), pekerja-pekerja Co-operative Central Bank Ltd ('CCB'), telah mendapat award daripada Mahkamah Perindustrian bagi pemecatan salah, dan diawardkan gantirugi sebanyak RM424,428.81 dan RM425,412.50 masing-masingnya. Disebabkan oleh kejatuhan CCB dan satu operasi menyelamat bagi penyimpan-penyimpannya, Bank Pusat Malaysia, di bawah peraturan 9(1)(c) Peraturan Perlu (Perlindungan Penyimpan),1986 ('Peraturan tahun 1986') telah memohon kepada Mahkamah Tinggi dan mendapat perintah untuk perlantikan penerima-penerima bagi mengurus hal-ehwal CCB. Bank Pusat tersebut selepas itu telah menyuntik anggaran RM523 juta ke dalam CCB, dan berikutan itu, bagi memastikan bahawa penyimpan-penyimpan diberikan keutamaan pembayaran, Yang Di Pertuan Agung dalam melaksanakan kuasa-kuasa yang diberikan kepadanya oleh Akta Darurat (Kuasa-Kuasa Perlu) 1979 ("Akta induk"), dan melalui

pindaan kepada Peraturan tahun 1986, telah menggubal peraturan-peraturan yang dikenali sebagai Peraturan Perlu (Perlindungan Penyimpan)(Pindaan), 1991 ("Peraturan tahun 1991"). Peraturan tahun 1991 pada hakikatnya telah memperkenalkan peraturan-peraturan baru ke dalam Peraturan tahun 1986, iaitu peraturan-peraturan 9(B) dan 13(2). Selain itu, melalui peruntukan-peruntukan anggapan dalam peraturan 9(b)(2) dan 5(2) di situ, Peraturan tahun 1991 tersebut juga telah memberi kuasa kebelakangan kepada peraturan-peraturan 9(B) dan 13(2), di mana kedua-duanya dianggap telah berkuatkuasa pada 23 Julai 1986.

Plaintif-plaintif, yang terkilan oleh Peraturan tahun 1991, telah memohon untuk satu keputusan atas keesahan Peraturan-peraturan tersebut. Mahkamah Tinggi memutuskan bahawa peraturan-peraturan 9(B) dan 13(2) adalah tak sah sejauhmana ianya bermaksud untuk beroperasi secara kebelakangan, kerana pihak berkuasa perwakilan di bawah Akta induk bagi membuat peraturan-peraturan tersebut, iaitu Yang Di Pertuan Agong, tidak mempunyai kuasa untuk membuatnya dengan kesan kebelakangan di bawah bahagian yang relevan Akta induk tersebut, iaitu s.2 nya. Kerajaan Malaysia, defendan di bawah, telah merayu terhadap keputusan ini, dan berhujah, antara lainnya, bahawa s.20 Akta Tafsiran (Akta 388) memberikan sokongan yang secukupnya bagi keesahan peraturan-peraturan yang dipersoalkan itu. Di hadapan Mahkamah Persekutuan, isu utama yang berbangkit adalah samada, dalam ketiadaan kuasa nyata yang diberikan oleh Akta induk, ianya terbuka bagi pihak berkuasa perwakilan untuk membuat perundangan subsidiari dan memberikan kesan kebelakangan padanya.

Diputuskan:
Oleh Peh Swee Chin HMP:

[1] Mana-mana perundangan subsidiari hanya boleh dibuat dengan operasi kebelakangan jika ianya dibenarkan oleh kuasa-kuasa nyata di dalam, atau melalui implikasi perlu daripada, Akta induknya. Dengan itu, untuk menjadi intra vires, peraturan 9B dan peraturan 13(2) mesti mematuhi s. 2 Akta induk tersebut, iaitu ianya mestilah terlingkung di dalam bidang seksyen itu.

[2] Seksyen 2 Akta induk tidak secara nyatanya memberikan kuasa ke atas pihak berkuasa perwakilan untuk menggubal secara kebelakangan. Yang Di Pertuan Agung, dalam keadaan yang sedemikian, tidak mempunyai kuasa untuk membuat peraturan-peraturan yang dipersoalkan.

[3] Seksyen 2 Akta induk, melalui seksyen kecil 2(j) di situ, telah memberikan pihak berkuasa perwakilan, iaitu Yang Di Pertuan Agung, kuasa untuk "amending any written law", untuk "suspending the operation of any written law", atau untuk "applying any written law with or without modification".

Setelah membacanya dengan betul, s.2, melalui implikasi perlu, mungkin memberikan kuasa kepada pihak berkuasa perwakilan untuk menggubal secara kebelakangan. Namun begitu, walaupun ianya benar bahawa, dengan membuat operasi peraturan-peraturan 9B dan 13(2) Peraturan tahun 1991 tersebut kebelakang kepada 23 Julai 1986, ianya kelihatan sebagai suatu perbuatan "amending any law" oleh pihak berkuasa perwakilan, atas fakta dan keadaan di sini, implikasi kuasa yang sedemikian bukanlah suatu implikasi yang "necessary" atau sesuatu yang perlu.

[4] Seksyen 20 Akta Tafsiran kita merujuk kepada pelbagai perundangan subsidiari yang "may be made". Walaupun perkataan-perkataan "may be made" membangkitkan kesamaran, s. 20, dengan penghadan yang terdapat di dalamnya, hanya membenarkan perundangan subsidiari kebelakangan dibuat jika sumber kuasa bagi membuatnya berasal daripada sumber yang sah dan kompeten seperti dari statut yang dibuat oleh badan perundangan. Jika kuasa sedemikian tidak diberikan, pihak berkuasa perwakilan tidak berhak untuk menggubal secara kebelakangan.

[Rayuan ditolak.]

Cases referred to:

McEldowney v. Forde [1971] AC 632 ***(foll)***
Loh Kooi Choon v. Government of Malaysia [1977] 2 MLJ 187 ***(cit)***
Phillips v. Eyre [1890] LR 6 QB 1 ***(refd)***
Attorney-General v. Cold Storage (Singapore) Pte. Ltd. [1979] 1 MLJ 277 ***(not foll)***
Broadcasting Company of Australia Proprietory Ltd. & Ors. v. The Commonwealth [1934-1935] 52 CLR 52 ***(refd)***
Dr. Indramani v. W.R. Nathan & Ors. [1963] 1 SCR 721 ***(foll)***
Union of India v. Madan Gopal Kabra [1954] 5 SCR 541 ***(foll)***
Blue Metal Industries Ltd. v. Dilley [1970] AC 827 ***(refd)***

Legislation referred to:

Emergency (Essential Powers) Act 1979, s. 2, 2(1), 2(2)(j), 2(3), 2(4)
Essential (Protection of Depositors) (Amendment) Regulations 1991, regs. 5(1), 5(2), 9B, 9B(1)(f), 9B(2), 13(2)
Essential (Protection of Depositors) Regulations 1986, regs. 9(1)(c), 13
Forward Contracts (Regulation) Act 1952, ss. 11, 12, 12(1)
Interpretation Act (Act 388), ss. 20, 23(1), 25
Companies Act 1961 [NSW], s. 185
Interpretation Act [Singapore], s. 23, 23(1)
Port of Singapore Authority Act (Cap. 73), s. 28(1), 28(2)
Wireless Telegraphy Act 1905-1909, s. 10

Other sources referred to:

Administrative Law of Malaysia & Singapore by Prof. M.P. Jain, 2nd Edn., pp. 32, 93
Halsbury's Laws of England, 4th Edn., Vol. 44, p. 636, para. 1004

For the appellant - Ahmad Zaki Husin SFC (Aktar Tahir, SFC, with him)
For the respondents - V.K. Lingam (Peter Kay Raj, Satchithanandhan & Adam Bachek with him); M/s. V.K. Lingam & Co.

JUDGMENT

Peh Swee Chin FCJ:

Many material facts and much history leading to this appeal before us have been marshalled with clarity in the judgment of the Court below, (see [1992] 3 CLJ 1497). We will only refer to such facts very briefly and only when necessary in order to avoid wholesale repetition. This written judgment is predicated by having to set a very short but very important principle at rest; the principle being whether any subsidiary legislation can be made with retrospective effect notwithstanding the absence of power expressly given by the parent Act. In this connection, s. 20 of the Interpretation Act (Act 388) has been argued with vigour as dispensing with the need for such express power. We will consider this section later.

The respondents are the plaintiffs and the appellant, the defendant. Both plaintiffs were employees of the Cooperative Central Bank Ltd. (hereafter referred to as 'the CCB') at all material times. The 1st plaintiff obtained an award for RM424,428.81 in the Industrial Court, being Award No. 32/89 in connection with his wrongful dismissal by CCB and similarly, the 2nd plaintiff obtained a judgment for RM425,412.50 also against CCB from Kuala Lumpur High Court in connection with the termination of his service by CCB.

As a result of CCB's financial collapse and as a rescue operation for its depositors, the Central Bank of Malaysia, more popularly known as Bank Negara Malaysia, under reg. 9(1)(c) of the Essential (Protection of Depositors) Regulations 1986 (hereafter called 'the Regulations of 1986') applied to the High Court for the appointment of two receivers to manage the affairs and property of CCB. The receivers applied to the High Court for an order of priority of payment by CCB to various persons. It is to be remembered that CCB has been at all material times, a deposit-taker, i.e. it could take the deposits of money like a commercial bank.

The High Court determined that the plaintiffs herein, for priority purpose, would be paid after (1) costs, charges and expenses and (2) depositors. The plaintiffs herein appealed and the Supreme Court held that the plaintiffs herein, who were also the plaintiffs therein, "should rank equally" with the depositors. The Central Bank subsequently applied to the Court that the sum of RM523 million injected into CCB by the Central Bank should be classified under the category of "costs, charges and expenses" under reg. 13 of the Regulations of 1986,

the money from the Central Bank was apparently meant for depositors of CCB who were in dire straits. The same High Court dismissed the application. Regulation 13 of the Regulations of 1986 is set out below:

> Regulation 13. Costs
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> All proper costs, charges and expenses, including remuneration, of receivers and other persons appointed under these Regulations shall be payable out of the assets of the deposit-taker in priority to all other claims.

After the aforesaid application, the Yang di-Pertuan Agong, made amendments to the Regulations of 1986 by regulations known as Essential (Protection of Depositors) (Amendment) Regulations 1991 (hereafter called the Regulations of 1991). It is to be remembered that the Regulations of 1986 and the Regulations of 1991 were made under the Emergency (Essential Powers) Act, 1979 (hereafter called 'the parent Act').

Fearing that the Regulations of 1991 might invalidate the award obtained by the 1st plaintiff and also the judgment obtained by the 2nd plaintiff, both plaintiffs once again went to Court by originating summons herein citing the Malaysian Government as defendant claiming (1) that the Regulations of 1991 were *ultra vires* and void and/or (2) that the Regulations of 1991 did not (in any event) invalidate such judgment or award aforesaid. The Court below found, in effect or to the effect, in two parts; (1) that regs. 9B and 13(2) of the Regulations of 1991 were *ultra vires* and void because they were made retrospectively (therefore they could not affect the plaintiffs), and (2) that the Regulations of 1991, whether *intra vires* or *ultra vires* the parent Act, would not or did not affect such accrued rights from the Supreme Court's judgment and the Industrial Court's award in question. The said originating summons was, in the event that had turned out, strongly resisted or defended, thus justifying the fear of the plaintiffs.

At the commencement of the hearing, the defendant abandoned all the grounds of appeal relating to part (2) of the finding of the Court below but the appeal proceeded against part (1) of the finding, i.e. that regs. 9B and 13(2) of the Regulations of 1991 were *ultra vires* and void. The judgment of the Court will be confined to the relevant submission and reasons on part (1) of the finding of the Court below.

The plaintiffs had sought, *inter alia*, before the Court below for a declaration that the Regulations of 1991 be declared *ultra vires* and void and in granting it, the learned Judge only found it relevant to consider, out of Regulations 1991, reg. 9B(1)(f), reg. 9B(2); reg. 13(2) and reg. 5(2). They are, perforce, set out below:

9B. (1) Subject to these Regulations, a manager may take all action as may be necessary in relation to the business, affairs and property of the deposit-taker, or for the purpose of protecting the interests of the depositors, creditors or customers, or persons having any lawful dealings or transactions with the deposit-taker, and, without prejudice to the generality of such power, the manager may, in particular, do all or any of the following:

(f) apply the assets of the deposit-taker which are at any time in his possession, or under his custody or control, during the course of carrying on the business of the deposit-taker or the management of the affairs and property of the deposit-taker, subject to reg. 13, to meet the deposit liabilities of the deposit-taker in preference to all other unsecured liabilities of the deposit-taker.

9B (2) The new reg. 9B introduced into the principal Regulations by para. (1) shall be deemed to have come into force on the date of the commencement of the principal Regulations, save that in its application to s. 31B of the Central Bank of Malaysia Ordinance 1958, it shall be deemed to have come into force as from the date of commencement of the said s. 31B, that is, 1 January 1988.

5 (1) Regulation 13 of the principal Regulations is amended by renumbering it as "13(1)" and inserting thereafter a new para. (2) as follows:

(2) The proper costs, charges and expenses referred to in para. (1) shall include the following, regardless whether the same were paid personally by the receivers or the other persons referred to in para. (1) (hereinafter in this regulation referred to as "other persons"), or were paid by such receivers or other persons out of the assets of the deposit-taker, on behalf of the deposit-taker:

(a) the remuneration (including any contributions to any employees provident fund established by, under, or by virtue of, any written law) of all persons employed by the deposit-taker, or by the receivers or the other persons, for the purpose of the business and affairs of the deposit-taker, or for the purpose of the performance of the functions, the discharge of the duties, or the exercise of the powers of the receivers or the other persons;

(2) Paragraph (1) shall be deemed to have come into force on the date of the commencement of the principal Regulations, and, accordingly, reg. 13 of the principal Regulations as amended by para. (1) shall be deemed to have been an integral part of the principal Regulations as from that date.

a It will be realised from the order appealed from, that the objection is in effect directed against reg. 9B(2) and reg. 5(2); the former makes the new reg. 9B (the subject matter of this appeal) come into force retrospectively on the date of the commencement of the Regulations of 1986 i.e. 23 July 1986; while the latter makes reg. 13(2) (another subject matter of this appeal) similarly b retrospective in operation from the same date of 23 July 1986.

This restropective operation of the regulations in the order appealed from lies in the heart of this appeal. More about it later.

The learned Judge came to the conclusion that the aforesaid regs. 9B and c 13(2) of the Regulations of 1991 were invalid insofar as they purported to operate retrospectively because, the delegated authority under the parent Act for making the regulations in question, *viz*. the Yang di-Pertuan Agong, was not given power to make them with retrospective effect under the relevant part of the parent Act, *viz*. its s. 2, the relevant parts of which are set out d below:

> 2. (1) **Subject to the provisions of this section**, the Yang di-Pertuan Agong may make any regulations whatsoever (in this Act referred to as "Essential Regulations") which he considers desirable or expedient for securing the public safety, the defence of Malaysia, the maintenance of public order and of supplies and services essential to the life of the community. e (Emphasis added)
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> (2) Without prejudice to the generality of the powers conferred by the preceding subsection, Essential Regulations may, so far as appear to the Yang di-Pertuan Agong to be necessary or expedient for any of the f purposes mentioned in that subsection:
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> ...
>
> (j) provide for amending any written law, for suspending the operation of any written law and for applying any written law with or without modification;
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> g ...
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> (3) Essential Regulations may provide for empowering such authorities, persons or classes of persons as may be specified in the regulations to make orders, rules and by-laws for any of the purposes for which such h regulations are authorised by this Act to be made, and may contain such incidental and supplementary provisions as appear to the Yang di-Pertuan Agong to be necessary or expedient for the purposes of the regulations.

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(4) An Essential Regulation, and any order, rule, or by-law duly made in pursuance of such a regulation shall have effect notwithstanding anything inconsistent therewith contained in any written law, including the Constitution or the Constitution of any State, other than this Act or in any instrument having effect by virtue of any written law other than this Act.

The Court below referred correctly, with respect, to the plenary power of Parliament to legislate retrospectively subject to any restriction in the Federal Constitution and to a citizen seeking redress on account of any subsidiary legislation.

On reference by any citizen who is aggrieved by any subsidiary or delegated or subordinate legislation, his Lordship referred to the "threefold task" stated by Lord Diplock in *McEldowney v. Forde* [1971] AC 632, 658 in approaching such a reference i.e.:

> ... Where the validity of subordinate legislation made pursuant to powers delegated by Act of Parliament to a subordinate authority is challenged, the Court has a threefold task: first, to determine the meaning of the words used in the Act of Parliament itself to describe the subordinate legislation which that authority is authorised to make, secondly, to determine the meaning of the subordinate legislation itself and finally to decide whether the subordinate legislation complies with that description.

After considering all the submissions, his Lordship came to the finding as stated above.

Let us look at the "threefold task" in connection with the parent Act and the Regulations of 1991 below.

Looking at the parent Act, as first part of such a threefold task, we find that the parent Act was enacted to deal with certain grave and sudden situations requiring immediate actions or solutions. In view of the brevity of the parent Act, consisting of only Six pages in contemplation of such a variety of grave situations aforesaid, the parent Act in our view, is deemed to confer, large and comprehensible powers to the Yang di-Pertuan Agong, who is undoubtedly the most prestigious delegated authority for making any subordinate, or delegated or subsidiary legislation, the three separate words of "subordinate", "delegated" and "subsidiary" incidentally all mean the same thing, all being attributive to "legislation". The relevant part of s. 2 of the parent Act is para. (j) of sub-s. 2 thereof as set out above, the other paragraphs referring to other specific matters not relevant to the instant appeal. About the second part of the said threefold task, the function of the Regulations of 1991 is clear, they were made with hindsight to effect necessary changes in details to adapt them to earlier unforeseen contingencies in experience rapidly gained so far, see

Prof. Jain's *Administrative Law of Malaysia and Singapore*, 1980 Edn., at p. 32 about factors leading to the growth of subsidiary legislation. Such function aforesaid, suffice it to say, is one of the normal functions of subsidiary legislation. Regulation 9B and reg. 13(2) in the Regulations of 1991 were enacted to fulfil this function.

The last part of the threefold task is of course the controversy in this case as to whether reg. 9B and reg. 13(2) comply with s. 2 of the parent Act, i.e. whether they are within the scope of the section, and if they do not, they are *ultra vires* the said s. 2. For this, some discussion is necessary about the pros and cons as follows before one draws a conclusion.

Any subsidiary legislation is in effect a transfer of power from Parliament to some other authority, eg. from the Administration with the executive authority of Malaysia vested in the Cabinet, down to any local authority. In order to protect the authority, dignity and standing of Parliament and at the same time, the man in the street, safeguards for such subsidiary legislation are essential and Courts are part of such safeguards.

Parliament has plenary powers to make laws including retrospective law. If any authority is required at all for the proposition, see *Loh Kooi Choon v. Government of Malaysia*, [1977] 2 MLJ 187. This is, of course, subject to any express restriction in the Federal Constitution.

Now s. 2(2)(j) of the parent Act has given the said delegated authority the power of "amending any written law", for suspending the operation of any written law, or for "applying any written law with or without modification"; see the said para. (j) set out above. By making the operation of regs. 9B and 13(2) of the Regulations of 1991, retrospective to 23 July 1986, it may seem very much to be an act of "amending any written law ... ." Coupled with this, it has been urged both here and below that s. 20 of the Interpretation Act (Act 388) provided support for the validity of the Regulations in question. The said s. 20 is set out below:

> 20. Subsidiary legislation may be made to operate retrospectively to any date which is not earlier than the commencement of the Act or other written law under which it is made or, where different provisions of that law come into operation on different dates, the commencement of that law under which it is made:
>
> Provided that no person shall be made or shall become liable to any penalty in respect of any act done before the date on which the subsidiary legislation was published.

His Lordship has held in the Court below that the said s. 20 would be irrelevant in the absence of such express power to the delegated authority to legislate retrospectively.

This s. 20 is crucial but more will be said about this later, as we discuss further other relevant aspects or the pros and cons of the matter.

Thus, concern for some material aspect of the retrospective law was expressed archetypally by Willes J in *Phillips v. Eyre* [1890] LR 6 QB 1, 23:

> Retrospective laws are no doubt *prima facie* of questionable policy, and contrary to the general principle that legislation by which the conduct of mankind is to be regulated ought, when introduced for the first time, to deal with future acts, and ought not to change the character of past transactions carried on upon the faith of the then existing law ... .

Such concern stated above, though in different wording and phraseology including the description of delegated authority functioning in effect as or like a mini Parliament, runs through the cases in relation to the presumption against retrospective operation of any statute in the absence of any express contrary intention. It is unnecessary to cite a multitude of such cases which are not directly on the point in question here apart from expressing such similar concern which must be borne in mind while one considers the absence of express power to a delegated authority to legislate retrospectively.

Now s. 2 of the parent Act has not expressly conferred power on the delegated authority to make the regulations in question but one begins to wonder whether the same s. 2 has, by necessary implication, conferred such power because of the shortness of the parent Act, the said paragraph (j) saying about amending "any law", and the grave and sudden situations occasioning such parent Act in the first place. More about this later.

An overview in Malaysia on such a point can be found in "*Administrative Law of Malaysia and Singapore*" by Prof. M.P. Jain, 2nd Edn., at p. 93 as follows:

> The Courts do at times imply certain restrictions on the general power to make subsidiary legislation. One such implied restriction is that regulations should not have retrospective effect unless the parent Act expressly or by necessary implication confers a power to that effect. Parliament can enact laws with retrospective effect, but a subordinate legislator has to act within the limits of the power delegated to him, and a mere general power to make regulations does not empower him to make regulations with retrospective effect. The reason for this rule is that retrospective legislation disturbs vested rights of the people, and this only the legislature should do.

Such similar overview in Britain can also be found in *Halsbury's Laws of England*, 4th Edn., Vol. 44 at p. 636, para. 1004 in connection with interpretation of subsidiary legislation as set out below:

> 1004. **Other matters affecting operation**. Since, if validly made, subordinate legislation has the same force and effect as a statute, little remains to be said with respect to its operation. However, it may be mentioned that, whereas the question whether it is intended to have retrospective effect is to be answered by the application of principles identical with those by which the question is determined in relation to statutes, the question whether it is capable of having such an effect depends upon the scope of the enabling power.

In Malaysia, the case under appeal seems to be the first reported case, directly on the point and in Singapore there is also one such case i.e. *Attorney-General v. Cold Storage (Singapore) Pte Ltd.*, [1979] 1 MLJ 277, which held the view contrary to that in the case in the Court below and concerned herein.

In the Singapore case, s. 28(1) of the Port of Singapore Authority Act (Cap.73) first exempts premises vested in the Port of Singapore Authority from the operation of Municipal Ordinance and Local Government Ordinance 1957 and the bye-laws thereunder.

Section 28(2) of the same Act also makes provision for application of the said Ordinance to such premises in the manner described therein by means of subsidiary legislation in the form of publication in the *Gazette* of a declaration or order by the relevant Minister.

The relevant Minister published on 19 March 1977 such a declaration which, to quote, "shall be deemed to come into operation on 28 October 1976". The respondent, the aggrieved corporate citizen filed an originating summons for a declaration from the Court that it was *ultra vires* the Act aforesaid.

Section 28(2) aforesaid is set out below:

> The Minister may, after consultation with the Authority, by order published in the *Gazette* declare that any other provisions of the said Ordinances; and by-laws or of any written law repealing or re-enacting the provisions thereof, shall apply to the premises of the Authority, and thereupon the same shall apply accordingly.

The High Court in Singapore held, *inter alia*, that the terms of s. 28(2) did not enable the declaration in question to be made with retrospective effect (the case in the High Court was unreported). On appeal to the Court of

Appeal, Singapore, *inter alia*, with regard to the question of retrospective operation of the Minister's declaration, the High Court's decision on this point was overruled by reference to s. 23 of the Interpretation Act (Singapore), thus:

> Section 23(1) of the Interpretation Act provides that subsidiary legislation made under any Act or other lawful authority, unless it be otherwise provided in such subsidiary legislation, shall take effect and come into operation on the date of its publication in the *Gazette*. Subsection (2) of s. 23 provides that any such subsidiary legislation may be made to operate retrospectively to any date not being a date earlier than the commencement of the Act or the establishment of the authority by or under which such subsidiary legislation is made.

Section 23 mentioned above appears to be similar or the same in substance to s. 20 of our own Interpretation Act (Act 388) set out above. Re-reading it, the proviso to s. 20 above can be ignored for the purpose of the present appeal as it relates to criminal offences.

We will reserve our further comments on this s. 20 of the Interpretation Act while we attempt a very brief survey of other cases directly on the point in other common law jurisdictions.

There does not seem to be any decided English case (neither has any been cited to us) about such absence of express power to a delegated authority to legislate retrospectively and the consequent effect on such subsidiary legislation being made with retrospective effect notwithstanding the absence of such said express power.

The Australian case closest to but still not directly on the point in issue is *Broadcasting Company of Australia Proprietory Ltd. & Ors. v. The Commonwealth* [1934-1935] 52, CLR 52. In this case under s. 10 of the Wireless Telegraphy Act 1905-1909, "the Governor-General may make regulations, not inconsistent with this Act, prescribing all matters which by this Act are required or permitted to be prescribed or which are necessary or convenient to be prescribed for carrying out or giving effect to this Act".

By reg. 3 of the regulations made under the Act on 7 August 1928, the postmaster general may deduct an amount not exceeding five pence from certain licence fees, and this regulation "shall be deemed to have commenced on l November 1927". The High Court of Australia while stressing that the validity of such regulations must depend on precise term of the law conferring such power on the Governor-General, held that the reg. 3 was invalid on ground of interference with concerned rights and also on the ground that no purpose of the Act was carried out.

Apparently the High Court of Australia was not presented with an argument of the absence of such express power to legislate retrospectively being granted under the parent Act i.e. the Wireless Telegraphy Act, to the Governor-General so that it did not deal with it.

Such failure to deal with it is not considered amiss as all common law jurisdictions practise the adversarial system where it is left to the parties in a given case to present their respective cases in the best manner as appears to them and not for the Court to direct or dictate to them as to how to conduct their cases. A Court would not descend into the arena of the parties except possibly in one of those situations where not to do so would defeat the rights of a party altogether and to cause a gross injustice to him.

Canadian cases cited in the Court below did not deal directly with the point in question.

It is in India also like in Singapore, that the point was dealt with and decided directly, and in India, in favour of the argument that a delegated authority can only legislate retrospectively if it is authorised by the parent Act either expressly or by necessary implication to do so.

One of the Indian Supreme Court cases cited to us is *Dr. Indramani v. W. R. Nathan & Ors.* [1963] 1 SCR 721. There under the relevant parent Act entitled Forward Contracts (Regulation) Act 1952, by its s. 12(1), "the Central Government may, either on a request in writing received by it ... from ... or if in its opinion it is expedient so to do make bye-laws for all or any of the matters specified in s. 11 ...". The question arose whether a bye-law with retrospective effect made under s. 12 aforesaid was valid. The Indian Supreme Court after a review of cases in the High Court and Supreme Court, held the Central Government had no power to make such a bye-law with retrospective effect when s. 12 aforesaid did not expressly confer that power. It was held that the Parliament could legislate retrospectively under the Constitution subject to its limitations but the same could not be said in case of the delegated authority, (*viz.* the Central Government) exercising a delegated power as the scope of such delegated power was not co-extensive with that of Parliament. The Indian Supreme Court case affirmed the same *ratio decidendi* which emerged in an earlier Indian Supreme Court case of *Union of India v. Madan Gopal Kabra* [1954] 5 SCR 541.

We are, after anxious consideration, of the view that any subsidiary legislation can only be made with retrospective operation if it is authorised by an express power in, or by necessary implication from its parent Act. We agree, with respect, with the Indian Supreme Court cases, *supra*, and also subscribe to the overview in Britain as well as in Malaysia from the two books mentioned

above, which is amply supported by the overtones and undertones of judgments of those cases (though not directly on the point) in all common law jurisdictions dealing with the presumption against retrospective operation of statutes in the absence of a contrary intention in them.

Therefore, in the parent Act in the instant case, s. 2 is the enabling section for the Regulations of 1986 and the Regulations of 1991 to be made. It does not confer any express power to the delegated authority i.e. the Yang di-Pertuan Agong to legislate retrospectively. Though our brief description of the parent Act may make it possible that there may be some implied power to the delegated authority to legislate retrospectively, but such implication of such power is not a "necessary" i.e. an essential one on the facts and circumstances in this case.

We are also of the opinion that our view is more consistent with the concept that power from any subsidiary legislation can never rise above that in its parent Act. We are inclined to this view notwithstanding the Singapore case cited above, which, with great respect, we do not propose to adopt.

We venture to give our reasons. An Interpretation Act is a statute, concerned, *prima facie*, with meanings of words used in statutes so that the same words can have uniform meanings as far as possible, particularly those words which occur frequently in the statutes, so that the same meanings need not be repeated in various statutes with much tedium. Section 20 of our Interpretation Act refers to such retrospective subsidiary legislation which "may be made". These three words give rise to some ambiguity. They may mean that if it is made to operate retrospectively, it is by itself and nothing else, in order perfectly. They may also mean that it may be made on a certain underlying premise but unexpressed i.e. only when it is enabled by its parent Act to do so. We lean towards the latter meaning. In a nutshell, s. 20 with the limitation therein contained, merely permits the making of retrospective subsidiary legislation but the source of such power for making it must come from a valid, competent source eg. statute of the legislature. If no such power is given, the delegated authority is not entitled to legislate retrospectively.

That complete reliance on s. 20 by itself may not be safe is illustrated in another way. Thus, eg. *ex facie*, s. 25 seems broadly to reinforce the said former meaning of the said three words. Section 25 is set out below:

> Section 25. Subsidiary legislation shall be deemed to be made under all powers thereunto enabling, whether or not it purports to be made in exercise of any particular power or powers.

But s. 23(1) of the same Interpretation Act on the other hand, seems to lend weight to the latter meaning of the said three words, and s. 23(1) is set out below.

> Section 23(1) Any subsidiary legislation that is inconsistent with an Act (including the Act under which the subsidiary legislation was made) shall be void to the extent of the inconsistency.

We are finally fortified in the view we hold of s. 20 of our Interpretation Act by a *dictum* of Lord Morris of Borth-y-Gest who delivered the unanimous judgment of the Privy Council on an appeal from Australia in *Blue Metal Industries Ltd. v. Dilley* [1970] AC 827. In that complicated case which concerned the language of s. 185 of the Companies Act 1961 (NSW), in connection with the merger of companies through the compulsory acquisition or transfer of shares of one company to another. It was sought, *inter alia*, to be argued for the appellant that the said s. 185 applied to the transfer of shares in one company to **two other companies jointly**, and not only the transfer of shares to another company **alone** (Emphasis added) because in the Interpretation Act 1897 (NSW) words in the singular would include the plural, and vice versa unless the contrary intention appeared, as in other similar provisions of the Interpretation Acts of some other countries.

The Privy Council held that s. 185 of that Companies Act, applied, on its language and the facts of the case, to the transfer of shares to another company alone. Lord Morris of Borth-y-Gest said at p. 848 *ibid*, as follows:

> It would seem unlikely that the legislature would solely depend upon the provisions of the Interpretation Act if there was an intention to legislate with such important consequences as to give powers of compulsory acquisition not to a single acquiring company but to a group of companies. The Interpretation Act is a drafting convenience. It is not to be expected that it would be used so as to change the character of legislation. Acquisition of shares by two or more companies is not merely the plural of acquisition by one. It is quite a different kind of acquisition with different, consequences. It would presuppose a different legislative policy.

We are of the view that the learned Judge was right in his conclusion, and we have no good reason to interfere with his conclusion. We therefore dismiss the appeal with costs here and below.

Reported by WA Sharif